No. 2972

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY, a corporation, and PERCY G. ALLEN,
Appellants,

vs.

BROWN-MEYER COMPANY,
a corporation,
Appellee.

On Appeal from the District Court of the United States for the District of Oregon.

APPELLANTS' REPLY BRIEF TO APPELLEE'S SUPPLEMENTAL BRIEF.

T. J. GEISLER,
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THE IRWIN-HODSON CO., PORTLAND, ORE.

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ON THE MOTIONS.

The general questions of practice presented by appellee in this case are substantially the same as those presented in the companion case No. 2971, and have been met and disposed of by appellants in the latter.

The papers which appellee seeks to strike out, to-wit: "all included after line 6, page 31 to page 56 inclusive, of Transcript"—is the motion to vacate supplemental decree of March 21, 1916, and the affidavits and exhibits in support of same; also the motion for leave to file supplemental answer (Trans. p. 46), the petition therefor, and proposed supplemental answer.

All these papers were expressly stipulated (see Trans. 96) by appellee, as required in the Transcript, also certified to be correct, and the Clerk of District Court was authorized to certify same in the Transcript. See stipulation of parties, Trans., p. 100.

The appellee generously does not object the order denying motion to vacate, Trans., p. 57. Note, this order recites the very papers appellee would eliminate.

Like remarks apply to the order denying leave to file supplemental answer. Trans., p. 58.

The proposal of appellants to raise a new issue on the new device was certainly fair. It suggested the only feasible way of getting at the facts, unless appellee by its silence conceded the facts to be as stated by appellants in said moving papers.

With regard to the cavil of appellee as to the transcript not stating that the supplemental decree and order refusing to dissolve same, both appealed from, were *entered* in the court below:—

It is to be remembered that appellee's counsel collaborated in the preparation in brief form of the transcript in this case, and all done is stipulated as correct over his signature. Therefore is it not to be presumed, in the absence of even any contrary assertion, that the decree and order appealed from *were entered* on the date they were signed?

But really counsel for appellee is woefully forgetful of the record. Note that the *petition on appeal, and Order* allowing of same by the Hon. Chas. E. Wolverton, the District Judge, before whom all the matters came up, *expressly states that the said supplemental decree was "entered* March 21, 1916," and that the "*order refusing to dissolve* and vacate said supplemental decree *was entered* April 17, 1916." Trans. 62.

All these recitals were admitted as correct by counsel for appellee by the stipuations on p. 96 and p. 100 of Trans. Appellee has even embodied the statements and admissions above referred to in the top part of page 4 of its Supplemental Brief.

ON THE MERITS.

The entire proceedings of appellee in the lower court, culminating in said supplemental decree, were an unwarranted and unlawful dilation of the claims of the patent in suit, in wanton disregard of the rights of the general public, as well as those of appellants.

And it culminated, furthermore, in making out an innocent device used by appellants, under license from another patentee, to be an infringement, by *forcing* such innocent device into a state never contemplated, and absurd.

As said in Buzzell v. Andrews, 25 Fed. 822, cited with approval by Judge Hazel in Winslow v. Bronson, 106 Fed. 178, 183, "*Though a device may be forced* to operate like the plaintiffs, yet it is not an infringement if such use were not the object of its construction."

Appellants pray that in order to end this useless litigation, and save appellants from being further harrassed, this court dispose of the entire matter on this

appeal by directing the court below also what decree ought to have been entered in the first instance, in accordance with the facts brought out on the trial, and now fully before this court. For such disposition by this court it is submitted authority is found in Smith v. Vulcan Iron Works, 165 U. S. 518, as supplemented by

Mast Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 494.

Pelton v. Williams, 235 Fed. 130, 135.

The technical invasion of appellee's alleged patent for the brief period appellants required to ascertain the nature of said alleged invention from the records at the Patent Office is trivial and imposed no tangible damage upon appellee; and, moreover, appellants, before suit was brought (see Answer, Trans. 12, and testimony of Allen, appellant, Trans. 87-90), in order to avoid this useless litigation, offered a relatively large sum—$50, finally $100—though the proofs show appellee would be entitled at most to merely a nominal sum for such technical invasion. *But appellee demanded* $300 (Trans. 87). The good faith of appellants in changing the device originally used, so as to avoid infringement, is also conceded in this suit. See testimony of Meyers of appellee, Trans. 71, and stipulation of counsel, Trans. 82. Appellee's conduct has been most inequitable throughout.

Respectfully submitted,

T. J. GEISLER,

Of Counsel for Appellants.